

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE**

D'Pergo Custom Guitars, Inc.,	)	
	)	
Plaintiff,	)	Civil Action No. 1:17-CV-000747-LM
	)	
v.	)	
	)	
Sweetwater Sound, Inc.,	)	
	)	
Defendant.	)	
	)	

**DEFENDANT'S MOTION *IN LIMINE* TO EXCLUDE  
EXPERT TESTIMONY OF JEFFREY SEDLIK**

NOW COMES Sweetwater Sound, Inc. ("Sweetwater") and seeks to exclude the expert testimony of Jeffrey Sedlik ("Mr. Sedlik") concerning Plaintiff's alleged actual damages for the reasons that follow and as set forth in its Memorandum of Law.

1. Mr. Sedlik's testimony is neither relevant nor reliable because it is based upon a legally improper measure of damages. The proper measure of damages is the value of a hypothetical licensing fee negotiated between a willing buyer and willing seller. *See, e.g., On Davis v. The Gap, Inc.*, 246 F.3d 152, 160-61 (2d Cir. 2001); *Rivera v. Méndez & Compañía*, 988 F. Supp. 2d 174, 178-79 (D.P.R. 2013). Mr. Sedlik fails to use this standard despite purporting to do so in his report. His testimony therefore rests on incorrect law and must be excluded under Rule 702. *See, e.g., United States v. Cunningham*, 679 F.3d 355, 379–81 (6th Cir. 2012); *Hebert v. Lisle Corp.*, 99 F.3d 1109, 1117 (Fed. Cir. 1996).

2. Any testimony that survives a Rule 702 analysis must be excluded under Rule 403 as unduly prejudicial and misleading. *See, e.g., Southard v. United Reg'l Health Care Sys., Inc.*, No. 7-06-CV-11-L, 2008 WL 4489692, at \*2 (N.D. Tex. Aug. 5, 2008) (excluding testimony “based on an erroneous legal premise” under Rules 702 and 403).

3. Mr. Sedlik’s damages calculation based on “multipliers” is improperly punitive. *See, e.g., Grant Heilman Photography, Inc. v. McGraw-Hill Companies*, 115 F. Supp. 3d 518, 526–27 (E.D. Pa. 2015) (collecting cases).

4. Mr. Sedlik used inapposite comparators for establishing a reasonable licensing fee. *See Country Rd. Music, Inc. v. MP3.com, Inc.*, 279 F. Supp. 2d 325, 331 (S.D.N.Y. 2003).

#### **PRAYER FOR RELIEF**

WHEREFORE, Sweetwater respectfully requests that this Honorable Court:

- A. Exclude the testimony of Jeffrey Sedlik; and
- B. Grant such other relief as may be just and proper.

Dated: August 1, 2019

Respectfully submitted,  
Attorneys for Defendant,  
SWEETWATER SOUND, INC.

Bernstein, Shur, Sawyer & Nelson, P.A.

/s/ Edward J. Sackman

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